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In The

# Supreme Court of the United States

October Term, 1987

LLOYD BOERSMA and PHYLLIS BOERSMA,

*Plaintiffs-Appellants,*

vs.

DONNA KARNES, Nebraska State Tax Commissioner, and NEBRASKA DEPARTMENT OF REVENUE,

*Defendants-Appellees.*

## ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

## MOTION TO DISMISS APPEAL

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Pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, the Appellees move that the appeal herein taken be dismissed on the ground that the appeal does not present a substantial federal question.

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Nebraska in *Boersma v. Karnes*, 227 Neb. 329, 417 N.W.2d 341 (1988), affirming the judgment of the District Court of Nuckolls County, Nebraska, is referred to in the jurisdictional statement. Both the opinion of the Nebraska Supreme Court and the judgment of the District Court of Nuckolls County, Nebraska, are included in the Appendix to Appellants' jurisdictional statement.

## GROUNDS OF JURISDICTION OF SUPREME COURT

The jurisdictional requisites are adequately set forth in the Appellants' jurisdictional statement.

## CONSTITUTIONAL PROVISIONS AND STATUTES

Pertinent constitutional and statutory provisions are set forth in Appendix D of Appellants' jurisdictional statement

## STATEMENT OF THE CASE

Appellants Lloyd Boersma and Phyllis Boersma filed a Form 1040 U.S. Individual Income Tax Return, and a Form 1040N Nebraska Individual Income Tax Return, for the year 1984. Appellants reported income from social security benefit payments in the amount of $20,798.00 on their Federal Form 1040 return. One-half of the amount of these social security benefits were subject to federal income tax in 1984. The inclusion by Appellants of their income from social security benefit payments on their Federal Form 1040 return for 1984 was required following the passage by Congress of Pub.L.No. 98-21, §121, 97 Stat. 80 (*codified at* 26 U.S.C. §86 (Supp. III 1985)).

Pursuant to Neb.Rev.Stat. §77-2715(1) (Supp. 1983), the Nebraska resident individual income tax for 1984 was determined by applying the applicable Nebraska percentage rate to the taxpayer's federal income tax liability for the taxable year, as adjusted by the modifications decreasing federal taxable income permitted by Neb.Rev.Stat. §77-2716 (Supp. 1983). Appellants, by virtue of their inclusion of a portion of their social security payments as income on their federal return, and being subjected to federal income tax liability on this amount, were required to pay individual Nebraska income tax based on the applicable percentage rate as applied to their federal income tax liability, which included federal tax liability incurred as a result of their receipt of social security income.

Appellants filed a claim for refund with the Nebraska State Tax Commissioner in the amount of $766.00,

resulting from their asserting entitlement to an adjustment decreasing their federal taxable income by one-half of the social security benefit income received by Appellants during the taxable year. The State Tax Commissioner denied Appellants' refund claim. Appellants subsequently filed an action in the District Court of Nuckolls County, Nebraska, seeking review of the Tax Commissioner's denial of the refund claim, pursuant to Neb.Rev.Stat. §77-2798 (Reissue 1986). The district court granted the Tax Commissioner's motion for summary judgment. On appeal, the Nebraska Supreme Court affirmed the decision of the District Court of Nuckolls County, Nebraska. *Boersma v. Karnes*, 227 Neb. 329, 417 N.W.2d 341 (1988). Specifically, the Nebraska Supreme Court rejected Appellants' contention that the imposition of Nebraska State Income Tax based on Appellants' federal tax liability (which included liability resulting from the inclusion of social security benefit income) resulted "in an unconstitutional burden on the power of Congress to provide for the general welfare, in violation of U.S. Const. art. VI, cl. 2, the 'supremacy clause'." *Id.* at 332, 417 N.W.2d at 344. The court also rejected Appellants' contention that the imposition of Nebraska State Income Tax under the circumstances was precluded by the provisions of 42 U.S.C. §407 (Supp. III 1985). *Id.* at 335, 417 N.W.2d at 346.

## ARGUMENT

### I.

### THE NEBRASKA STATE INCOME TAX IMPOSED UNDER NEB.REV.STAT. §77-2715(1) (SUPP. 1983) IS NOT PRECLUDED BY THE PROHIBITION AGAINST THE ASSIGNMENT OF SOCIAL SECURITY BENEFITS CONTAINED IN 42 U.S.C. §407 (SUPP. III 1985).

Appellants' principal contention challenges the right of the State of Nebraska to impose state income tax under Neb.Rev.Stat. §77-2715(1) (Supp. 1983) on the basis of Appellants' federal tax liability, which, by virtue of the provisions of I.R.C. §86, included liability incurred on a portion of Appellants' income from the receipt of social security payments for the tax year in question. Appellants assert the operation of the Nebraska income tax statute in this manner is contrary to the prohibition against the assignment of social security benefit payments contained in 42 U.S.C. §407 (Supp. III 1985). Subsection (a) of 42 U.S.C. §407 provides:

> The right of any person to any future payment under this subchapter shall not be transferrable or assignable, at law or in equity, and none of the monies paid or payable or rights existing under this subchapter shall be subject to *execution, levy, attachment, garnishment, or other legal process*, or to the operation of any *bankruptcy or insolvency law*. (Emphasis added).

An examination of the plain language of 42 U.S.C. §407(a) reveals the prohibition contained in this section has no application whatsoever under the facts of this

case. This section provides the rights of any person to social security benefit payments shall not be subject to "execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." Appellants, in their amended petition filed in the District Court of Nuckolls County, Nebraska, alleged the prohibitions against "levy" or "other legal process" in 42 U.S.C. §407(a) applied in this instance.

The word "levy," when utilized as a noun as in 42 U.S.C. §407, is defined in *Black's Law Dictionary*, 816 (5th Ed. 1979) as

> A seizure. The obtaining of money by legal process through seizure and sale of property; the raising of the money for which an execution has been issued.

The phrase "legal process" is defined in *Black's Law Dictionary*, 1085 (5th Ed. 1979) as follows:

> This term is sometimes used as equivalent to "lawful process." Thus, it is said that legal process means process not merely fair on its face, but in fact valid. *But properly it means a summons, writ, warrant, mandate, or other process issuing from a court.* (Emphasis added).

Furthermore, with regard to the general language of 42 U.S.C. §407 referring to "other legal process," the Appellees submit that, under the rule of *ejusdem generis*, this general phrase must be construed to refer only to matters of the same kind as specifically enumerated in 42 U.S.C. §407. *Smith v. Davis*, 323 U.S. 111, 117 (1944). Thus, the phrase "other legal process" should be construed to refer only to matters involving

the issuance of process from a court, as the specific listing of "execution," "levy," "attachment," "garnishment," and "bankruptcy" proceedings clearly contemplate protecting such benefit payments from being subjected to loss through legal actions involving the collection of debts.

Appellants seek to interpret the word "levy" in 42 U.S.C. §407 to apply to the assessment of a tax. While it is true that the word "levy" is sometimes used in the context of taxation, it is obvious that, construing the provisions of 42 U.S.C. §407 in their entirety, it is not employed in this manner in 42 U.S.C. §407.

The word "levy" is an ambiguous term, and its meaning is dependent upon the particular context in which it is used. *Hale v. Whitlock Oil Service, Inc.*, 450 F.2d. 170, 174 (10th Cir. 1971). When used as a noun, the word "levy" means "[a] seizure; the raising of money for which an execution has been issued." *Plaxico v. Webster*, 175 S.C. 69, 178 S.E. 270 (1935). *See also Burkett v. Clark*, 46 Neb. 466, 64 N.W. 1113 (1895). The definition of "levy" contained in the Uniform Enforcement of Foreign Judgments Act provides:

> "Levy" means to take control of or create a lien upon property under any judicial writ or process whereby satisfaction of a judgment may be enforced against such property.

Uniform Enforcement of Foreign Judgments Act §1(c), 13 U.L.A. 183 (1986).

It is fundamental that, in construing statutory provisions, "[t]he meaning of particular phrases must be determined in context." *SEC v. National Securities*,

*Inc.*, 393 U.S. 453, 466 (1969). Furthermore, "[i]t is a familiar principle of statutory construction that words grouped in a list should be given related meaning." *Third National Bank v. Impac Ltd., Inc.*, 432 U.S. 312, 322 (1977) (footnote omitted). Consistent with these fundamental principles of statutory interpretation, the Nebraska Supreme Court, in rejecting Appellants' assertion that the word "levy" in 42 U.S.C. §407 is the equivalent of the word "tax", stated:

> The word must be read in context with the remainder of the statute. Section 407 states that Social Security benefits shall not be "subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." The words surrounding "levy" in this statute operate to protect the Social Security benefits, which may be paid to persons such as plaintiffs, from judicial proceedings against persons such as plaintiffs. Judgment creditors in legal proceedings may not use the proceeds of the Social Security system to satisfy private obligations. Viewing the provision of § 407 in its entirety, we hold that plaintiffs' argument that the word "levy" is the equivalent of "tax" is without merit. In context with the remainder of the statute, the word "levy" refers to the enforcement of a judgment or other legal process involving the collection of debts through execution, attachment, garnishment, or levy.

*Boersma v. Karnes*, *supra*, 227 Neb. at 336, 417 N.W.2d at 346-47.

In spite of the plain meaning of the language contained in 42 U.S.C. §407, Appellants nevertheless contend the reference to this section in I.R.C. §86 indicates Congress views 42 U.S.C. §407 as a prohibition against

taxation of social security benefits. I.R.C. §86, which, as previously indicated, subjects to federal income taxation a portion of the social security benefit income of certain taxpayers, provides, in pertinent part: "(a) In general. Gross income for the taxable year of any taxpayer described in subsection (b) (notwithstanding Section 207 of the Social Security Act [42 U.S.C. §407]) includes social security benefits in an amount equal to the lesser of. . . ." The Nebraska Supreme Court, refusing to accept Appellants invitation to employ this parenthetical reference in I.R.C. §86 as a means to alter the plain meaning of 42 U.S.C. §407, stated:

> Plaintiffs point to the parenthetical clause in subsection (a) "(notwithstanding section 207 of the Social Security Act [42 U.S.C. § 407])," and argue that if § 407 is not interpreted as prohibiting a tax on Social Security benefits, Congress would not have bothered to modify § 407 in I.R.C. § 86. The relevant portion of § 407 is set out above. Plaintiffs contend that the inclusion of this parenthetical statement is a clear indication that Congress interprets § 407 as a prohibition against a tax on these benefits. We do not agree, and hold that § 407 is not a specific indication of congressional intent to prohibit state taxation of Social Security benefits. As stated above, § 407 is concerned only with the protection of Social Security benefits from legal proceeding by creditors.

*Boersma v. Karnes*, *supra*, 227 Neb. at 337, 417 N.W.2d at 347

It is a general rule of statutory construction that exemptions from taxation are to be narrowly construed. *Bingler v. Johnson*, 394 U.S. 741 (1969). If Congress

had intended to exclude social security benefit payments, taxed at the federal level, from state taxation, specific language could have been provided in 42 U.S.C. §407(a) to achieve this result. Significantly, 45 U.S.C. §231m (Supp. III 1985), a portion of the Railroad Retirement Act, specifically provides that annuity benefits received under the Act are not " . . . subject to any *tax* or to garnishment, attachment, or other legal process." (Emphasis added). As the Nebraska Supreme Court stated: "Use of the word 'tax' in §231m indicates that Congress clearly recognizes the distinction between the words 'tax' and 'levy' in the context of exclusionary statutes, and clearly sets out how to exclude federal benefits from state taxation." *Boersma v. Karnes*, *supra*, 227 Neb. at 338, 417 N.W.2d at 347.

Appellants also seek to attach significance to an amendment to 42 U.S.C. §407 enacted in 1983, providing:

> (b) No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

In *Ellender v. Schweiker*, 575 F.Sup. 590, 599 (S.D.N.Y. 1983), the court, discussing the purpose behind the adoption of this amendment, stated:

> . . . section 207(b) [42 U.S.C. §407(b)], enacted on April 20, 1983 in order to restrict modification of section 207(a), is briefly elaborated upon in legislative history which reveals that, after the passage of the Bankruptcy Reform Act of 1978, hundreds of cases considered social security and SSI benefits of

> debtors to be income for purposes of a Chapter XIII bankruptcy. Section 207(b) was passed to prohibit assignment of these benefits 'notwithstanding any other provisions of law.' H.Rep. No. 1900, Pub.L. 98-21, 98th Cong., 1st Sess. 82-83, reprinted in [1983] U.S. Code Cong. & Ad. News 143, 301-302.

Thus, it is evident that the adoption of 42 U.S.C. §407(b) was designed to prevent federal bankruptcy courts from treating social security benefits of debtors as income available for payments to creditors under bankruptcy plans. This is entirely consistent with the interpretation that 42 U.S.C. §407(a) is limited to protecting social security benefits from the reach of creditors seeking to obtain such funds by legal process. The amendment to 42 U.S.C. §407(b) in no way alters the scope of the language contained in 42 U.S.C. §407(a), and cannot be construed to preclude the State of Nebraska from imposing an income tax based on federal tax liability which includes federal taxes paid as a result of the taxation of social security income under I.R.C. §86.

On the basis of the foregoing, Appellees submit it is clear the Nebraska Supreme Court correctly determined that neither the provisions of 42 U.S.C. §407 nor those of I.R.C. §86 preclude the State of Nebraska from imposing a state income tax based on the federal tax liability calculated by the inclusion of social security benefit income. As it is apparent that the Appellants claim that the imposition of Nebraska state income tax under such circumstances is prohibited by the federal statutes referred to is without merit, the Court should dismiss this appeal on the ground that the claimed

conflict between state and federal law does not present a substantial federal question.

## II.

## THE NEBRASKA STATE INCOME TAX STATUTES ARE CONSISTENT WITH FEDERAL LAW, AND DO NOT CONFLICT WITH OR IMPEDE THE POWERS OF THE FEDERAL GOVERNMENT IN VIOLATION OF THE SUPREMACY CLAUSE.

Appellants, by virtue of the fact that they were required to pay Nebraska individual income tax on the basis of federal tax liability calculated by including a portion of their social security income as federal taxable income, also contend the State of Nebraska has imposed a tax which unconstitutionally burdens the power of Congress to provide for the general welfare, in violation of U.S. Const. art. VI, cl. 2, the Supremacy Clause. Appellees submit that Appellants' constitutional argument in this regard fails to present a substantial federal question warranting plenary consideration by this Court.

Both the state and the national governments possess the authority to impose income taxes. This Court has recognized that "[t]he state and national governments must co-exist," and that "[e]ach must be supported by taxation of those who are citizens of both." *Helvering v. Gerhardt*, 304 U.S. 405, 422 (1938). The power of a state to tax, as well as the power of the federal government, is founded upon the protections and privileges afforded by government to the recipients of such income. *See Graves v. New York ex rel. Keefe*, 306 U.S. 466 (1939). The seminal case of *McCulloch v. Maryland*,

17 U.S. (4 Wheat.) 316, 424 (1819), contains the following language recognizing the dual taxing powers of Congress and the states:

> That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied.

Appellants emphasize that, in *Helvering v. Davis*, 301 U.S. 619 (1937), this Court upheld the authority of Congress to enact the Social Security Act under the power granted under Article I, Section 8 of the U.S. Constitution, to tax and provide for the general welfare. Appellants assert that, if they are required to pay Nebraska income tax on social security benefit income which is taxed at the federal level, the state has acted in contravention of the national policies and purposes underlying the enactment of the Social Security Act.

This Court has frequently stated that, in cases involving the claimed invalidity of state law under the Supremacy Clause, "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Chicago & North Western Transp. Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311, 317 (1981), *quoting Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). *See also Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504, 522 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1981). In *Commonwealth Edison*

*Co. v. Montana*, 453 U.S. 609 (1981), the Court, in reliance upon the above-quoted principle, held a Montana severance tax imposed on coal mined in the state was not invalid unde the Supremacy Clause on the ground that the tax frustrated and impaired national energy policies. Rejecting the argument that a violation of the Supremacy Clause could be founded upon such general national policy and purpose arguments, the court stated:

> In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), we rejected a pre-emption argument similar to the one appellants urge here. There, it was argued that the "basic national policy favoring free competition" reflected in the Sherman Act pre-empted a state law regulating retail distribution of gasoline. *Id.*, at 133. The Court acknowledged the conflict between the state law and this national policy, but rejected the suggestion that the "broad implications" of the Sherman Act should be construed as a congressional decision to pre-empt the state law. *Id.*, at 133-134. Cf. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U. S. 96, 110-111 (1978).
>
> * * *
>
> In cases such as this, it is necessary to look beyond general expressions of "national policy" to specific federal statutes with which the state law is claimed to conflict. (Footnote omitted).

*Id.* at 633-34.

As noted previously, the imposition of state income tax on the basis of federal tax liability (including federal income tax imposed by virtue of the receipt of social security income) is not precluded by any specific federal statute. Furthermore, it is evident that the

operation of the Nebraska individual income tax statute at issue does not conflict with the specific, articulated policy established by Congress in mandating the taxation of social security benefit income.

The extension of federal income taxation to income attributable to social security benefit payments received by certain individuals was mandated by Congress with the passage of Pub.L.No. 98-21 §121, 97 Stat. 80 (*codified at* 26 U.S.C. §86 (Supp. III 1985)). This statute requires social security benefits to be included in the gross income of "higher income" taxpayers (single individuals with over $25,000 of income and married individuals filing joint returns with income in excess of $32,000). The legislative history of this provision explains the congressional policies and purposes behind the extension of tax liability upon such income as follows:

> Your Committee believes that the present policy of excluding all social security benefits from a recipient's gross income is inappropriate. Your Committee believes that social security benefits are in the nature of benefits received under other retirement systems, which are subject to taxation to the extent they exceed a worker's after-tax contributions and that taxing a portion of social security benefits will improve tax equity by treating more nearly equally all forms of retirement and other income that are designed to replace lost wages (for example, unemployment compensation and sick pay.)
>
> * * *
>
> By taxing only a portion of social security and railroad retirement benefits (that is, up to one-half of benefits in excess of a certain base amount). Your

> Committee's bill assures that lower-income individuals, many of whom rely upon their benefits to afford basic necessities, will not be taxed on their benefits. The maximum proportion of benefits taxed is one-half in recognition of the fact that social security benefits are partially financed by after-tax employee contributions. The bill's method for taxing benefits assures that only those taxpayers who have substantial taxable income from other sources will be taxed on a portion of the benefits they receive.

H.R. Report No. 25, 98th Cong., 1st Sess. 24, *reprinted in* 1983 U.S. Code Cong. & Ad. News 143, 219, 242.

Clearly, the tax treatment of social security income received by individuals such as Appellants emanates from a congressional policy determination that, with respect to benefit payments received by certain "higher income" taxpayers, a portion of those benefits should be treated as income subject to taxation. The Nebraska income tax statutes, by basing individual income tax liability on a percentage of federal income tax liability, including federal taxes imposed as a result of the receipt of social security income, are not inconsistent with and do not conflict with articulated congressional policy. The Nebraska Supreme Court, after considering the policy evidenced by congressional action requiring the taxation of social security income received by certain taxpayers, concluded Appellants' Supremacy Clause claim was without merit, stating:

> Plaintiffs assert that *any* state taxation of these benefits burdens the act's operation. We disagree.
>
> * * *
>
> It is clear . . . that Congress determined that

> federal taxation of higher income taxpayer's benefits did not adversely affect the purposes of the Social Security Act. The Congress deliberately lifted a defined portion of Social Security benefits into a category subject to federal tax. A state's indirect recognition of this taxable category does not, in any degree, give the state "the power to destroy the purposes of the Social Security Act," as alleged by plaintiffs.

*Boersma v. Karnes*, *supra*, 227 Neb. at 333-34, 417 N.W.2d at 345-46.

Thus, while it is apparent that the Nebraska individual income tax statutes do not operate in a manner which conflicts with any federal statute, it is also clear that the state has not imposed any unconstitutional burden on the power of the federal government, as asserted by Appellants. The state has in no manner imposed a tax directly on social security benefit income, and the operation of the Nebraska statutes only affects social security recipients who fall within the "higher income" class of recipients required to pay tax on such income under federal law. It should be noted that Appellants, for the tax year in question, reported a federal adjusted gross income of over $88,000.00. *Boersma v. Karnes*, *supra*, 227 Neb. at 330, 417 N.W.2d at 344. While this Court in *Helvering v. Davis*, *supra*, noted the hope of the Social Security Act was "to save men and women from the rigors of the poor house," it would appear Appellants are in no need of such salvation. Undoubtedly, Congress has recognized that, with respect to certain "higher income" taxpayers, the extension of income tax liability to a portion of their social

security income represents a legitimate and sound policy judgment. The Appellees submit that the State of Nebraska has in no way acted to impair or burden the powers exercised by the federal government in a manner inconsistent with congressional policy, and, therefore, no violation of the Supremacy Clause exists by virtue of the operation of the Nebraska income tax statutes under these circumstances.

On the basis of established constitutional standards relating to the scope of the Supremacy Clause, it is evident that Appellants' contention that the operation of the Nebraska state income tax statutes results in an unconstitutional violation of the Supremacy Clause is meritless. Accordingly, the Court should dismiss this appeal on the ground that the asserted constitutional violation does not present a substantial federal question requiring plenary consideration by the Court.

## CONCLUSION

For the reasons stated above, Appellees respectfully request the Court to dismiss this appeal on the ground that no substantial federal question is presented.

Respectfully submitted,

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